

STATE OF MICHIGAN
COURT OF APPEALS

PANTHER MACHINE, INC., d/b/a PANTHER
CRANKSHAFTS,

UNPUBLISHED
January 30, 2007

Plaintiff-Appellee/Cross-
Appellee/Cross-Appellee,

v

ACCIDENT FUND INSURANCE COMPANY
OF AMERICA,

No. 264454
Oakland Circuit Court
LC No. 04-059771-CK

Defendant-Appellee/Cross-
Appellant/Cross-Appellee,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellant/Cross-
Appellee,

and

FEDERAL INSURANCE COMPANY and
GREAT NORTHERN INSURANCE COMPANY,

Defendants-Appellees/Cross-
Appellants.

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant, Liberty Mutual Insurance Company (Liberty), appeals as of right the trial court's opinion and order denying its motion for summary disposition and defendants, Federal Insurance Company (Federal) and Great Northern Insurance Company (Great Northern), cross appeal from the same order, which also denied their motion for summary disposition. Because the allegations in the underlying negligence complaint arguably come within Liberty's policy coverage and there is no basis for Federal and Great Northern's cross-appeal, we affirm.

In the underlying negligence action, Kisha Van Buren sued Panther on her individual behalf as well as in her capacity as the personal representative of the estate of her infant son, Izeair Kendell Bell. According to Van Buren, she slipped and fell while working for Panther and, as a result, her son was born prematurely and died a few short months after his birth. On appeal, this Court determined that Van Buren's claim and the estate's claim were barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131. *Van Buren v Panther Crankshafts*, unpublished opinion per curiam of the Court of Appeals, issued January 31, 2006 (Docket No. 255675).

While that suit was pending, Panther initiated the instant action against defendants, seeking a declaration as to which was required to indemnify and defend Panther in the negligence action. After the parties filed motions for summary disposition, the trial court ruled that Liberty and Accident Fund Insurance Company of America (Accident Fund) may have a duty to indemnify and defend and thus denied their motions for summary disposition. In this same order, the trial court granted summary disposition in favor of defendants, Federal and Great Northern, finding they had no duty to defend Panther in the underlying action.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). Although the trial court did not specifically state which subrule it relied on in granting summary disposition, we review the decision using the standard for MCR 2.116(C)(10) because the trial court considered evidence outside the pleadings. *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

On appeal, Liberty argues that the trial court erred in denying summary disposition in its favor because it had no duty to defend Panther in the underlying negligence action. We review de novo questions of law, including the interpretation of an insurance contract, *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004), and issues regarding an insurer's duty to defend an underlying tort action, *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004).

An insurer's duty to defend, which is broader than its duty to indemnify, arises in instances in which coverage is arguable, although the claim may be groundless or frivolous. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). To decide whether there is a duty to defend, this Court must consider the language of the insurance policy and determine the scope of the policy's coverage. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 268 Mich App 542, 548; 710 NW2d 547 (2005). When interpreting an insurance contract, this Court examines the contract's language, giving the language its plain and ordinary meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). The duty to defend also depends on the allegations in the complaint in the underlying action. *Citizens, supra* at 548. If the allegations in the complaint even arguably come within the policy coverage, the duty to defend arises. *Id.*

Liberty's and Accident Fund's employers' liability insurance policies provide that they apply to bodily injury, which "must arise out of and in the course of the injured employee's employment by you." The policies further provide that the insurer will pay damages from bodily injury, including damages "for consequential bodily injury to a spouse, child, parent, brother or

sister of the injured employee; provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you[.]”

In the underlying action, Van Buren alleged that she suffered bodily injury while she was employed by Panther and asserted that her child, Bell, suffered bodily injury as a result of the preterm labor caused by Van Buren's fall. Therefore, Bell's injury, as alleged in the complaint, fell within the scope of the coverage of Liberty's and Accident Fund's policies.

Although this Court later determined that the estate's claim in the underlying action was barred by the exclusive remedy provision of the WDCA, the duty to defend arises when coverage is arguable, even if the claim is groundless or frivolous. *Auto-Owners, supra* at 15. Therefore, the fact that the claim was ultimately barred does not mean that coverage was not arguable. Further, this Court resolves in favor of the insured any doubt about whether a complaint alleges liability under a policy. *Citizens, supra* at 548. As a result, Van Buren's allegations in the complaint in the underlying action arguably constitute a bodily injury as defined by Liberty's and Accident Fund's employers' liability policies, and the trial court properly denied their motions for summary disposition.

On cross-appeal, Federal and Great Northern primarily contend that the trial court erred in denying their motion for summary disposition because they do not owe Panther a duty to defend. However, the trial court granted their motion for summary disposition in part, concluding that neither had a duty to defend, and recognizing that their coverage was excess. Their argument, then, is misplaced and need not be considered.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto